

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**CHARLESTON**

**HARVEY PATRICK SHORT,**

**Plaintiff,**

**v.**

**Case No. 2:14-cv-16506**

**COMMISSIONER JIM RUBENSTEIN,  
and BENITA F. MURPHY,**

**Defendants.**

**PROPOSED FINDINGS AND RECOMMENDATION**

This matter is assigned to the Honorable Thomas E. Johnston, United States District Judge, and it is referred to the undersigned United States Magistrate Judge for submission of proposed findings and a recommendation for disposition, pursuant to 28 U.S.C. § 636(b)(1)(B). Only the plaintiff's claims against Jim Rubenstein and Benita Murphy remain. Pending before the court are Rubenstein and Murphy's Renewed Motion to Dismiss (ECF No. 67) and their Motion for Sanction Pursuant to Rule 37(d) of the Federal Rules of Civil Procedure (ECF No. 71).

For the reasons stated herein, it is respectfully **RECOMMENDED** that the presiding District Judge **GRANT** the defendants' Motion for Sanction (ECF No. 71) and **DISMISS** this civil action pursuant to Rules 37(d) and 41(b) of the Federal Rules of Civil Procedure because the plaintiff has failed to prosecute this matter. Additionally, as further addressed herein, it is respectfully **RECOMMENDED** that the presiding District Judge **GRANT** the defendants' unopposed Renewed Motion to Dismiss (ECF No. 67)



neither Rubenstein nor Murphy had authority, control or supervision over the conditions of confinement or the employees of the South Central Regional Jail<sup>1</sup> and had no decision-making authority concerning where the plaintiff was housed prior to the revocation of his parole. Accordingly, they contend that the Amended Complaint fails to allege sufficient facts upon which any plausible claim against them can be based. (ECF No. 68 at 2-5). The Renewed Motion to Dismiss and Memorandum in support thereof further assert that that Rubenstein and Murphy cannot be held liable in their official capacities or under a theory of *respondeat superior*, that they are entitled to qualified immunity, and that the plaintiff's request for injunctive relief is moot in light of his release from custody. (*Id.*)

The plaintiff has not filed a response to the Renewed Motion to Dismiss, which, according to the Certificate of Service, was served on him on that same date at the address in Yeadon, Pennsylvania, which he provided to the court and opposing counsel upon his release from custody. (ECF Nos. 56 and 67 at 3).

According to the defendants' Motion for Sanction, by correspondence on June 22, 2015, defendants counsel requested that the plaintiff provide, in writing, dates in July of 2015 when he would be available to appear in the Southern District of West Virginia for his deposition. (ECF No. 71 at 1 and Ex. A). Having received no response to the first correspondence, on July 20, 2015, defense counsel again wrote to the plaintiff at the Yeadon, Pennsylvania address to request that the plaintiff provide an acceptable date for his deposition. This correspondence was sent by both regular and certified mail. (ECF

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<sup>1</sup> The South Central Regional Jail is a state correctional facility operated by the West Virginia Regional Jail and Correctional Facility Authority.



(1) *In General.*

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent - or a person designated under Rule 30(b)(6) or 31(a)(4) - fails after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

Fed. R. Civ. P. 37(d)(1)(A). Upon certification that the movant has attempted to confer in good faith with the party who has failed to act, the court may order the failing party to pay reasonable expenses, including attorney's fees. Fed. R. Civ. P. 37(d)(1)(B).

Furthermore, pursuant to Rule 37(b)(2)(B) of the Federal Rules of Civil Procedure, the district court may impose sanctions, including dismissing the case in whole or in part. Fed. R. Civ. P. 37(b)(2)(B). Dismissal is also authorized under Rule 41(b) of the Federal Rules of Civil Procedure, where the court finds that the plaintiff has failed to prosecute a matter or comply with the federal rules. Fed. R. Civ. P. 41(b).

The defendants' motion asserts that, weighing the factors set forth in *Ballard v. Carlson*, 882 F.2d

counsel, or to otherwise participate in this litigation, and that no sanction other than dismissal is appropriate under the circumstances. (*Id.* at 2-3).

The plaintiff is an experienced *pro se* litigant, having filed 19 prior civil cases in this court alone. Having reached a settlement with some of the parties herein and having been released from incarceration, it appears that the plaintiff is no longer interested in pursuing this matter. Conversely, the defendants have expended time and resources to attempt to move this case forward through discovery, and the plaintiff has not cooperated.

For these reasons, the undersigned proposes that the presiding District Judge **FIND** that the plaintiff's failure to comply with the federal rules governing discovery and the failure to update the court and defense counsel with a working address and phone number warrants dismissal of this civil action. Accordingly, it is respectfully **RECOMMENDED** that the defendants' Motion for Sanction Pursuant to Rule 37(d) of the Federal Rules of Civil Procedure (ECF No. 71) be **GRANTED**, and that this matter be dismissed pursuant to Rules 37(d) and 41(b) of the Federal Rules of Civil Procedure.

Additionally, or alternatively, it is further respectfully **RECOMMENDED**

plaintiff shall have fourteen days (filing of objections) and three days (mailing) from the date of filing this Proposed Findings and Recommendation within which to file with the Clerk of this Court, specific written objections, identifying the portions of the Proposed Findings and Recommendation to which objection is made, and the basis of such objection. Extension of this time period may be granted by the presiding District Judge for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. *Snyder v. Ridenour*, 889 F.2d 1363 (4th Cir. 1989); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984). Copies of such objections shall be provided to Judge Johnston.

The Clerk is directed to file this Proposed Findings and Recommendation and to mail a copy of the same to the plaintiff and to transmit a copy to counsel of record.

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